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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

WILLIAM J. BYRNES
(202) 728-0401 Ext. 129

September 16, 1996

Office of the Secretary
Federal Communications Commission
Washington, DC 20554

Re: CC Docket No. 96-146

Dear sirs:

Transmitted herewith on behalf of Total Telecommunications, Inc., SaMComm, Inc. and Big Sky Teleconferencing, Ltd, are the original and nine copies of Reply Comments in CC Docket No. 96-146, Policies and Rules Governing Pay-Per-Call and Other Information Services Pursuant to the Telecommunications Act of 1996 and CC Docket No. 93-22, Policies and Rules Implementing the telephone Disclosure and Dispute Resolution Act.

If you have any questions, please contact the undersigned.

Sincerely yours,

William J. Byrnes

William J. Byrnes

Before the
Federal Communications Commission
Washington, D.C. 20554

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SEP 16 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Policies and Rules	)	
Governing Interstate Pay-Per-Call	)	CC Docket No. 96-146
and Other Information Services Pursuant to	)	
the Telecommunications Act of 1996	)	
	)	
In the Matter of	)	
	)	
Policies and Rules Implementing	)	CC Docket No. 93-22
the Telephone Disclosure and Dispute	)	
Resolution Act	)	

REPLY COMMENTS OF TOTAL TELECOMMUNICATIONS, INC., SAMCOMM, INC. AND BIG SKY TELECONFERENCING, LTD.

By Their Attorneys

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September 16, 1996

SUMMARY

No party filing Comments showed that the Commission had the legal authority to adopt the radical "redefinition" of "pay-per-call services" proposed in Paragraph 48 of the Commission's Order. Indeed, the Comments of other parties fortify the analysis of Total Telecommunications, Inc., SaMComm, Inc., and big Sky Teleconferencing, Ltd. ("CLECs") in their initial Comments of the legal and policy infirmities of this unwarranted proposal.

This proposal is contrary to the plain meaning of the Act. Indeed, furnishing of information services at no premium to callers achieves Congress's goals in the "Telephone Disclosure and Dispute Resolution Act" to protect consumers from charges in excess of normal transmission charges more effectively than the detailed regulation of calls for which premium charges are imposed. By labeling free information services as "pay-per-call services," the Commission would ban them. Some would be destroyed completely. Others would be made available only subject to excessive and uncompetitive 900 charges. The intent of Congress to protect the public from unjustified charges would be thoroughly perverted, with the result that the FCC would create the very evil Congress wanted it to stop.

Carriers have long used financial incentives to providers of information services and others to increase the traffic on their systems. The Commission's proposed redefinition would impact incentives paid to hotels, hospitals, universities, private payphone owners, MCI's Global Asset program and AT&T's Terminating Switched Access Arrangements and inhibit numerous other incentive programs from new competitors that will increase alternatives available to the public. Among information services destroyed would be free "dial-a-prayer," time, weather and the Commission's own information services, as well as the Internet services as they exist today.

While crippling new information services and new carrier efforts to stimulate traffic on their systems, the Commission would drive remaining services to the grossly uncompetitive 900 service that is still dominated by AT&T as a result of the Commission's failure to insist on the number portability Congress has mandated.

The effort by AT&T to escape the damage caused by the "redefinition" proposal for its own services while retaining them with respect to its competitors illustrates the profoundly anticompetitive nature of what the Commission has proposed and the hazards of meddling with the marketplace rather than simply doing what Congress has told the agency to do. The FTC is understandably confused by the FCC's correct statement that it is bound by Congress's definition of the scope of "pay-per-call services" at one point in its Order with its untoward effort later in the same Order to radically change what Congress has done.

The unknown organization calling itself "The Alliance of Young Families" evidences the fact that, at least in the minds of some, what is driving the perplexing effort to expand the definition Congress made into something profoundly more encompassing is a desire to suppress certain types of information content and a reckless willingness to suppress numerous other services going far beyond that target in order to achieve that goal. Supporters of the Helms Amendment the Supreme Court invalidated in its Sable decision on the ground that it was inadequately tailored want to achieve the same goal in an even more inadequately tailored context of a specialized statute designed to protect consumer pocket books rather than their souls. The Commission failed to state such a motivation for its peculiar proposal in its Order giving the public notice of what this proceeding is about and it should forswear any such illicit intention now.

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REPLY COMMENTS

Total Telecommunications Services, Inc., SaMComm, Inc. and Big Sky Teleconferencing, Ltd. ("CLECs") hereby submit joint reply comments in response to the Order and Notice of Proposed Rule Making released July 11, 1996 (hereinafter "Order') in the above-captioned proceeding (FCC 96-289).

In their initial Comments, the CLECs concentrated on a single proposal in the Order -- the proposed redefinition of "pay-per-call services" set forth in Paragraph 48 of the Order, which goes drastically beyond anything that Congress envisioned in the Telephone Disclosure and Dispute Resolution Act. This proposal is also out of step with the other matters contained in the Order and requires a much broader inquiry than the relatively straight forward and limited other proposals that consumed most of the text of the Order. The CLECs demonstrated in detail that the proposal was beyond the scope of the Commission's legal authority and it would have highly deleterious consequences on the developing information service and competitive local telephone service industries, and would deprive the public of many useful services and expose it to unnecessary charges for others.

The CLECs have reviewed the filings of other parties. No party has shown the Commission's legal authority to extend the statutory definition as proposed. Instead, many parties have echoed points of both law and policy raised by the CLECs in their Comments. Indeed, a study of the other Comments filed in this proceeding show that they reinforce the analysis set forth previously by the CLECs.

We will review that original analysis section by section in terms of points made by the other parties, and then further respond individually to comments made by AT&T, the FTC and T he Alliance of Young Families.

<u>The "Redefinition"of "Pay-Per-Call Services" is Contrary to the Act's Plain Meaning</u>

In Section I.A of their initial Comments, the CLECs argued that the proposed "redefinition" of "pay-per-call services" was contrary to the plain meaning of the Act. Congress was only concerned with services for which premium charges were imposed, especially if they are imposed under circumstances in which the reasonable expectations of consumers are being defeated. As the Direct Marketing Association observed, at page 5 of its Comments:

> The rule is over inclusive in another respect. It would result in treating services for which the consumer pays no more than the normal toll charge as fully subject to the pay-per-call rules. This would plainly conflict with the express statutory definition of pay-per-call services.

As HFT, LO-AD and American International observe (Comments at 3):

Nowhere does the FCC contend that this section is vague or ambiguous. Such a contention would be frivolous given its clarity.

To the contrary, the Commission itself states, in Paragraph 12 of its Order and Notice of Proposed Rulemaking, that Section 228(I)(2) is "detailed, unambiguous, and mandatory." We agree totally. So does the Federal Trade Commission. Focusing, as it quite properly should, on these unambiguous words of its sister agency, the FTC concludes that "the FCC does not believe it has the authority to change the definition of "pay-per-call services."

The problem, however, is that, between Paragraph 12 and Paragraph 48 of its Order and Notice of Proposed Rulemaking, the Commission does a complete flip-flop. In Paragraph 48 it announces what, in effect, is a totally new definition of "pay-per-call services" of its own minting. It states its tentative conclusion that "when a common carrier charges a telephone subscriber for a call to an interstate information service, any form of remuneration from that carrier to an entity providing or advertising the service, or any reciprocal arrangement between such entities, constitutes per se evidence that the charge levied actually exceeds the charge for transmission." In place of the Congressional criterion that to meet the definition the carrier must impose upon the subscriber a "per-call or per-time-interval charge that is greater than, or in addition to, the charge for a transmission of the call," the Commission proposes a totally new criterion -- that if a common carrier pays any form of remuneration to, or engages in any reciprocal arrangement with, an entity that provides or advertises the information service, this would constitute a "pay-per-call service." Thus the Commission abandons the statutory test of what the consumer pays the carrier and attempts to amend the statute itself, which it cannot lawfully do.

The irreducible fact that this is a redefinition cannot be overcome by the syntax of using the phrase per se evidence." As noted at page 3 of our initial Comments, the word "per se" means "by itself; in itself; taken alone, by means of itself; through itself; inherently; in isolation unconnected with other matters; simply as such in its own nature without reference to its relation." That quotation came from Black's Law Dictionary. Other dictionaries define the term similarly. Funk and Wagnall's New Practical Standard Dictionary defines the term as: "By itself, himself or herself; intrinsically; in or of its own nature, without reference to its relations." (1950 Edition, p. 979). The American Heritage Dictionary of the English Language defines it as: "Of, in, or by itself or oneself; intrinsically." (Third Edition p. 1350).

The instant proposal is as if the hypothetical rule in a state statute: "All vehicles will stop on a red light" were changed by a local police chief's rule that: "The fact that a light is amber constitutes per se evidence that the light is red." The result is that the original rule would therefore be changed fundamentally to provide in effect that: "All vehicles must stop on either a red or amber light." The fact that such inelegant syntax is used may suggest such possible explanations as embarrassment on the part of the entity making the change, a desire to obscure from a casual reader what the rule maker is doing, or an effort to distract attention from the fact that the rule maker is exceeding his own authority in making the change and realizes it. Whatever the reason for the obfuscation may be here, however, the semantic reality is that what is being done is a fundamental alteration in the "detailed, unambiguous and mandatory" definition Congress carefully crafted and enacted into law.

The term "per se" to describe legally prohibited activity is used rarely and only with great caution. Thus "per se" violations are struck down under Section 1 of the Sherman Act without further inquiry into the business or economic justification, impact on the market, or reasonableness of the restraint. United States v. Topco Associates, Inc., 405 U.S. 596 (1972); United States v. Sealey, Inc., 388 U.S. 350 (1967). The term "per se" is used in contrast to situations in which the rule of reason is applied. In the rare cases when the term "per se" is employed, the "anticompetitive nature and effect are so apparent and so serious that the courts will not pause to assess them in the light of the rule of reason." Sealey, 388 U.S. at 355. In light of such stern consequences, the term "per se" is applied sparingly. "We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a "pernicious effect on competition and lack...any redeeming virtues" (Northern Pac. R. Co. v. United States, supra, p. 15) and therefore should be classified as per se violations of the Sherman Act." White Motor Co. v. United States, 372 U.S. 253, 263 (1963). "If the challenged concerted activity of Northwest's members would amount to a per se violation of § 1 of the Sherman Act, no amount of procedural protection would save it." Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 293 (1985).

This is the term the Commission would apply to any situation in which a carrier pays remuneration of any sort to, or engages in any reciprocal arrangement with, an information service provider.

Furnishing of Information Services at No Premium Achieves TDDRA's Goals

CLECs argued in Section I.B of their Comments that the proposed redefinition of pay-per-call services did not advance the goals of the "Telephone Disclosure and Dispute

Resolution Act." CLECs demonstrated that the proposed "redefinition" would in actuality create the evil Congress found needed to be regulated; the result being that having created this evil, the Commission would then regulate it. The twisted thinking reflected in the proposed redefinition appears to be that the Commission should stop the offer of free information services to the public in order that the Commission can ensure that the public is made aware of charges being imposed that would not have been imposed at all in the absence of the Commission's intervention.

This fundamental point is reinforced by the fact that the author of the TDDRA amendments in the Telecommunications Act of 1996, Congressman Bart Gordon personally makes clear in his filing herein that the "focus of Section 701 is on the elimination of fraudulent billing for information services." (Letter of August 24, 1996 to Honorable Reed Hundt, page 1). When the public is being asked to pay nothing more than ordinary transmission charges, there is no need for regulation of non-existent charges. The Commission's "re-definition" would create "charges" where there are no charges under the perverse notion that thereby consumers will be protected from having unjustified charges imposed upon them. The Commission itself would become the source of the evil Congress sought to stop.

The Commission Lacks Authority to Alter the Statutory Definition

In Section I.C of their Comments, CLECs analyzed the statutory provisions involved and concluded that the Commission lacked legal authority to alter the definition of "pay-per-call services" set forth in Section 228 of the Communications Act. No party has shown, to the contrary, that the Commission has the authority to alter Congress's unambiguous definition.

The Federal Trade Commission states[1] that it has been given the authority to change the definition of "pay-per-call services" by the 1996 amendments to TDDRA. The FTC also observes the FCC's statement [2] that "regardless of whether the FTC extends the scope of its pay-per-call regulations, our pay-per-call rules continue to be delineated by the statutory definition of pay-per-call services contained in Section 228 of the Communications Act." The fact that this authority was given quite explicitly to one agency with respect to its responsibilities underscores the fact that Congress did not see fit to give such authority to the FCC. We observed, in Note 4 to our Comments, that the FTC's ability to extend the statutory definition is limited by 15 U.S.C. Section 5714(1) to instances in which it can make a determination that similar information and audio services are susceptible to the unfair and deceptive advertising and disclosure practices it is directed to curb, and that any such expansion of the definition applies only to the FTC Act and not to the Communications Act. We thus agree with the Commission's statement, in Note 25 of its Notice, as well as with the FTC's recognition of that fact, that the FCC is limited to the statutory definition of "pay-per-call services" in Section 228 of the Act. That statement is, of course, irreconcilable with the effort in Paragraph 48 of its Notice in which it seeks to radically expand the statutory definition.

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[1] Note 16 at page 9 of the FTC's Comments.

[2] Note 25 at page 6 of its Order and Notice of Proposed Rulemaking.

Section 4(i) Cannot Empower the Commission to Overturn Congress's Definition

Reviewing the applicable case law, in Section I.D of their Comments, CLECs showed that Section 4(i) of the Communications Act of 1934 gives the Commission no legal authority to upset Congress's carefully crafted balance of interests reflected in the statutory definition of "pay-per-call services." No party has made a showing to the contrary.

The Proposal is Beyond the Scope of TDDRA

In Section I.E. of their Comments, CLECs showed that the redefinition proposed is well beyond the scope of the Telephone Disclosure and Dispute Resolution Act, which is clearly limited to "pay-per-call services," and showed that there was no merit in vague suggestions that TDDRA gives the Commission a hunting license extending to all information services irrespective of whether there are premium charges to the public or a potential for fraud in imposing such charges. No party has provided legal authority for broadening of the scope of TDDRA along the lines of such suggestions.

Content-Based Judgments Concerning Specific Services Do Not Justify "Redefinition"

CLECs addressed, in Section I.F of their Comments, in a very preliminary and contingent way the perplexing shadow issue of content-based concerns that might conceivably provide the motivation for the proposed redefinition that has no rational connection whatsoever with the stated purposes of TDDRA and Section 228 of the Communications Act. The Commission has not explicitly stated that such concerns form any part of its motivation for considering the proposal and it is peculiar, to say the least, to have to address such a fundamental consideration when it has not been publicly and explicitly advanced. While conceivably the use of code words to suggest something a speaker dare not say in public plays some role in politics, it has absolutely no place in a formal agency proceeding required by law to be conducted on a record, and is inconsistent with the professionalism that has long characterizes this agency's proceedings. The Alliance of Young Families, however, quite candidly and explicitly makes clear that the concerns prompting its filing are with "dial-a-porn" and "obscene materials."

There is, as discussed in Section I. F. the CLEC Comments, and further discussed in the last section of these Reply Comments, no legal basis for taking action under Section 228 to address these concerns. The Commission's Order instituting this proceeding did not give the public adequate notice that such fundamental issues were to be addressed in this proceeding. The Telephone Disclosure and Dispute Resolution Act is not the proper vehicle for addressing such issues. Major Constitutional issues cannot be squirreled away in a few sentences in a mis-labeled paragraph in a proceeding dedicated to issues of an entirely different character. Such concerns are properly addressed in proceedings implementing other statutory provisions, such as Section 223 of the Communications Act, in which Congress provided that they might be addressed.

As HFT, LO-AD and American International observed (Comments at 8-9), the "redefinition of pay-per-call is...an impermissible violation of First Amendment Rights insofar, as it is, in actuality, an attempt to improperly regulate content." They point out that content-based intentions must lie behind the "redefinition" proposal, since the agency must be presumed to recognize and intend the inevitable consequence of its proposed action:

> The FCC knows that information providers cannot offer their services at the reasonable and customary long distance rates without accepting some form of remuneration from the carrier. Thus, although the consumer is paying no more for the service, it is branded with the pay-per-call label and penalized with the non-deniability hurdle to collection. Unable to have equal access to the much cheaper transmission service, the content is in effect being regulated out of the more competitive markets domestically and completely out of the international markets.

The fact that the proposed regulation would also regulate out of the competitive market a much larger amount of content than the targeted content would only make it all the more illegal.

Moreover, if the Commission were to promulgate a widely sweeping rule potentially suppressing all free information services, but then enforced it only against a small subset of transactions, such as ones it might consider indecent, very serious legal questions would be presented as to equal enforcement of the law and whether the real reason for the rule were something other than its avowed purpose. Selective enforcement of a facially uniform rule in a way that suppresses protected speech is unlawful. City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988). A "facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers." 486 U.S. at 759. The Supreme Court went on to explain, at 763, that:

> ...a law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship. This danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official. As demonstrated above, we have often and uniformly held that such statutes or policies impose censorship on the public or the press, and hence are unconstitutional, because without standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker.

The practical damage done to the emerging competitive telecommunications and information services industries cannot be justified by proposals that are vastly more sweeping than would be needed to address such concerns. The proposals would amount to a clear violation of the First Amendment. We regret that it appears necessary to discuss even in a preliminary way such a possibility the Commission itself has not put on the table for public discussion. But we think the Commission can dispose of it by simply declaring that content-based judgments have no place in the implementation of the Telephone Disclosure and Dispute Resolution Act.

The "Redefinition" Would Unjustifiably Inhibit Creative Measures to Generate Traffic

There was considerable agreement expressed in Comments with the showing in Section II.A of the CLEC Comments that the proposed "redefinition" was undesirable also on public policy grounds since it would inhibit creative measures to generate traffic. CLECs pointed out numerous instances in which commissions have been paid to parties who help generate traffic on their networks for which no premium prices are charged -- including, among others, hotels, hospitals, universities, private pay phones, credit card providers and subscribers to AT&T's Terminating Switched Access Arrangements and MCI's Friends and Family service. The Teleservices Industry Association observes (Comments at 16) that:

> To the extent that third parties are able to stimulate traffic over a carrier's network, carriers have always been free to tender, and have engaged in, payment of commissions to these entities for traffic resulting from their attraction of new customers. In fact, the practice of paying commissions to marketing agents who generate traffic on their networks permeates the entire communications industry.

As was noted by CLECs (at pages 19-20), the statutory definition of information service provider in Section 3(20) of the Communications Act would include a very substantial percentage of the calling public.

Under the FCC's proposal, any information provider or promoter who receives "any form of remuneration" from a carrier carrying calls to its information service, or which has engaged in any kind of "reciprocal arrangement" with the carrier, must discontinue the information service unless it is carried as 900 telephone traffic. Any other form of communications service would be forbidden. That would mean an end to a great many innovative information services and a great many telecommunications services, who, in order to break into the field, are the most likely to offer incentives to fill their facilities. It would be especially likely to hurt relatively small information service providers, who cannot afford the expense of 900 service. Thus, for example, while large Churches may possibly be able to afford 900 service for their "dial-a-prayer" lines, small churches and individual ministers, priests and rabbis, who now use a simple local line with an answering machine cannot afford 900 service -- which they would be required to do should they receive any financial contribution from a carrier. (Of course, there is no justification for the Commission's imposing such unnecessary expense on the large Churches either).

Many of the large number of information services that would be affected were discussed in the initial Comments filed by CLECs and other parties. Those lists, however, are merely illustrative and not inclusive. Moreover, they do not and cannot describe the new services that would be offered in the future only if alternatives less expensive than 900 service are available. The hugely novel "redefinition" proposal would have a sweep so broad that it is doubtful anyone could describe in advance all the services that would be affected.

One currently existing information service provider which would fall within the purview of this ban would be the Federal Communications Commission itself. The Commission now provides a toll-free information service out of its National Call Center in Gettysburg, Pennsylvania. Callers in the District of Columbia, Virginia, Florida, Maine, Vermont, Kansas, Montana, Delaware, Nebraska and Wyoming may call 888-225-5322 and receive information about telecommunications issues. By early 1997, there will be nation-wide coverage. The Commission has advertised its service on several occasions. Indeed, one such public notice was released on September 4, 1996. (No. 64954). Since most carriers furnishing the 888 service now used to call the Commission's information service pay remuneration in the form of fees to the Commission, the use of their services would come within the ban established under the Commission's proposed "redefinition." The Commission has given much more substantial public notice of its "toll-free information service" than it has to the "redefinition" proposal, deeply submerged in the Order instituting this proceeding, which would ban the Commission's own "toll-free information service" along with numerous other toll-free information services.

The Commission could, of course, offer the information service over a 900 service but it would no longer be the advertised "toll-free" service it assured the public it was providing, and it is perhaps questionable how many members of the public would care to pay 900 service rates to call the service, particularly, of course, if they were to find that the amount of time required to get an adequate answer to their questions proved long and therefore expensive as well. Undoubtedly, many members of the public would find it unseemly that the Government charges them for answering, or perhaps in some instances not answering, their questions. In view of the lack of 900-number portability, the Commission would have to choose a specific carrier providing 900 service, most likely AT&T, the service's predominant supplier. Such a choice would be regarded as replete with significance beyond anything the Commission might wish. Members of the public being assessed such charges to call their Government over what was once described as a "toll-free" service may well be somewhat indignant and have great difficulty in seeing a salutary public policy producing such a result. CLECs respectfully suggest that the Commission's offer of a "toll-free information service" was a good idea. Its inconsistent and unfounded proposal to ban such services is a very bad idea.

Another class of already existing free information services that would be banned by the Commission's proposal are carrier-provided information services, such as weather or time, which have long been provided to the public without charge. There might be some question of interpretation of the wording of the Commission's "redefinition" proposal in Paragraph 48 of its Order as to whether the a carrier would be considered as paying "any form of remuneration" to itself or engaging in "any reciprocal arrangement" with itself, when only the carrier providing the information service is involved in its transmission. The Federal Trade Commission was concerned that the FCC was unclear that the FCC covered "the situation where a carrier is vertically integrated with an information service provider." (FTC Comments at Footnote 17). It appears to CLECs that this most obvious of cases has not been left out by the FCC, however, since obviously corporate identity on two sides of a transaction is the ultimate reciprocal arrangement and the ultimate coalescence of interest, and it would scarcely make sense to permit the carrier itself to do what is forbidden to any other member of the public.[3] To the extent that the degree of involvement between a carrier and an information service provider is regarded as a factor requiring more rigorous application of Section 228, provision of the information service by the carrier itself would seem to require the highest possible degree of Section 228 regulation.

It will be noted that the new Section 274 of the Communications Act added in 1996 gives the Bell Operating Companies the ability to provide electronic publishing on a national basis subject to separate affiliate requirements. Such BOC electronic publishing could, under the Commission's proposed redefinition, be provided only under a 900 service basis. It seems rather paradoxical that in CC Docket No. 96-152, the Commission is encouraging greater integration of carrier transmission service and information services, while in this docket, the Commission is penalizing even the most minimal degree of involvement between the two. See Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services, FCC 96-310, released July 18, 1996, 1996 LEXIS 3826.

Another large class of existing information services that would be affected is Internet services. The number of information service providers on the World Wide Web is huge. It includes such carriers as AT&T, MCI, Sprint, all the BOCs, the United States Telephone

[3] The case for separate treatment of directory services is stronger since directory services are specifically exempted from the definition of "pay-per-call services" by Section 228(I)(2) of the Communications Act. But, even there, if the Commission did actually have the legal authority to overcome Congress's clear exclusion in Section 228i(1)(B) of calls not subject to charges above transmission charges (and that is the implicit legal assumption upon which advancement of its "redefinition" proposal is predicated), its definition here can presumably override the other subsection as well.

Association, numerous equipment and software vendors, financial institutions such as the New York Stock Exchange, the American Stock Exchange, the NASDAQ market, Fidelity Investments and most major banks, and such Government agencies as the Federal Communications Commission, National Telecommunications and Information Administration, Securities and Exchange Commission, the House of Representatives, and the White House and numerous newspapers, magazines and broadcast organizations. It is virtually inconceivable that there is a telecommunications carrier that lacks a financial relationship with an Internet information service provider. Even, if a carrier could figure out which Internet service providers receive money from them or are engaged in some kind of reciprocal arrangement,[4] there may be no practical way of excluding these service providers from other Internet services carried. The result is therefore that, under the Commission's "redefinition" proposal, Internet services too, could be provided only over 900 service -- and the public loses again.

It would appear therefore that the authors of Paragraph 48 of the Commission's Order have a profound disagreement with Chairman Reed Hundt, who has emphatically promised the public that there will be no regulatory meddling with the Internet. In his "Chairman's Corner" message, currently posted on the Internet at http://www.fcc.gov/chairman.html, Chairman Hundt declares:

> I am strongly inclined to believe that the right answer at this time is not to place restrictions on software providers, or to subject Internet telephony to the same

[4] Since the Commission's proposed redefinition extends not only to service providers but also to any entity that "advertises" a service, it might well be reasoned that any Internet service provider that provides a hot button to a service prohibited by the Commission's proposed rule would also be prohibited from being carried by any communications service other than 900 service.

> rules that apply to conventional circuit-switched voice carriers. On the Internet, voice traffic is just a particular kind of data, and imposing traditional regulatory divisions on that data is both counterproductive and futile.
>
> More importantly, we shouldn't be looking for ways to subject new technologies to old rules. Instead, we should be trying to fix the old rules so that if those new technologies really are better, they will flourish in the marketplace.
>
> ***
>
> ...I'm inclined to believe our best guidance is to let technology, competition, and access reform make the problem go away. We are working to open markets so that these forces can operate most effectively.

The redefinition proposal in Paragraph 48 is the antithesis of letting technology, competition and access reform work for the public. It is, instead, the worst form of misguided and outdated Governmental momism. Ironically, among the vast number of free information services it would suppress would be Chairman Hundt's message in which he expresses a profoundly different view of the place of regulation.

In addition to destroying numerous existing services, the "redefinition" proposal would stifle innovation for new ways of providing information services. One interesting example is described in the article attached that recently appeared in the New York Times describing Moviefone, which provides the public a free telephone information service regarding the movies available at local theaters. The service in New York described in the New York Times uses the number 212-777-FILM. The service is available locally in the Washington Metropolitan area at 202-333-FILM. The free service is made possible by the use of advertising and a variety of barter arrangements for its promotion. Competitive local telephone companies might well wish to compete for such a service and offer a variety of barter arrangements to do so. The redefinition proposal, however, would prevent them from doing so.

In addition to the currently anticompetitive nature of 900 service discussed in the following section, there are other limitations in using 900 service as the exclusive vehicle for all information services that have been described in various Comments that reduce its value to the public. The most obvious one is the high price. Monopoly, or oligopoly services, like 900 service will, of course, inevitably be priced high. Eliminating every vestige of competition and of future competitive entry, as would the Commission's "redefinition" proposal, will drive the prices even higher yet.

Another factor leading to high prices for 900 service is the very large amount of "bad debt created by the non-deniable nature of the charge." (Comments of HFT, LO-AD and American International a page 5). More and more customers realize that they can get the information services without paying for them, and since the 900 service carrier simply passes the costs back to the information service provider, he has little incentive to make reasonable efforts to collect for the service. More and more, the "unfair billing" that prompted TDDRA is being replaced by "unfair refusing to pay." The Interactive Services Association reports, for instance, that MCI estimates that chargebacks (i.e., customer refunds of 900 calls) in 1996 will be $179 million, and the chargeback rate has increased approximately 20% during the last twelve months." (Comments at page 8). The effect may be all the greater when it is recognized that the 900 service carrier passes chargeback costs to the information service provider, who, when the level becomes more than he financially bear, withdraws his service -- which then no longer contributes to the growing chargeback totals. HFT, LO-AD and American International explain (Comments at page 6):

In the 900 realm, common carriers charge a premium for transporting 900 calls of approximately thirty-three cents per minute plus an additional ten percent for collection. Assuming a bad debt write off of fifty percent, which is not unusual in the industry, in order to offset the cost of providing the service, the provider of the service would have to charge the subscriber approximately eighty-six cents per minute, almost nine times the normal long distance rate.

Other limitations exist with respect to 900 service. The service is unavailable to callers from outside the country. This is particularly troublesome for information services whose financial viability depends upon callers from overseas. A hotline for information about sports such as Greco-Roman wrestling, cricket, sumo wrestling, rhythmic gymnastics or boccie might not be economically viable if the callership were limited to the United States, but would be quite viable if the information service could be offered on an international basis. Not many years ago, the same would have been true about soccer, but increasing popularity in the United States, although far short of its popularity throughout most of the world, may have grown to a point where some soccer information service may be viable on a U.S. domestic basis only. Even there, however, more substantial soccer information services may require international availability. The ability to share such information services with the rest of the world is important, not only to the individuals in this country with enthusiasm for sports that are not yet widely followed here, but ultimately to the developing of a sense of world-wide sharing with people elsewhere in the world who have the same interest. Stifling of American information services by consigning them to 900 service would deprive the United States of a valuable export at a time when our country's trade balance requires encouraging, rather than affirmatively discouraging, the export of U.S. services.

900 service is also not available at most hotels, businesses and car phones. Travelers

therefore cannot use information services giving them, for example, stock market quotes, sports results, weather or time. They would be totally deprived of information services now available to them while traveling for free.

Moreover, as the FTC points out (in Note 17 to its Comments), it "is not clear whether the FCC's proposal will serve to move all pay-per-call transactions back into the 900 service access code." The FTC points out the problem where U.S. common carriers are not directly involved in a transaction, such as when payments are made instead to foreign common carriers. The Commission cannot regulate foreign carriers. Thus, even if its enormously sweeping rule were put into effect and rigorously and comprehensively enforced, it could not prevent arrangements between information providers and foreign carriers. Since the Commission's authority would force U.S. carriers carrying an information service on other than a 900 basis out of business, the role of foreign carriers in carriage of information services would become correspondingly greater. Thus, even if the extraordinarily sweeping redefinition proposal were put into effect and comprehensively and rigorously enforced, it would fail to do what it set out to do. Arrangements would be made with foreign carriers rather than with United States carriers -- a dubious benefit to the United States.

Moreover, even as it stands, the Commission's proposal could not be enforced in a comprehensive and non-discriminatory fashion. The Commission simply does not know what arrangements may exist between carrier and entities that have interests providing or advertising information services. The Commission's deregulation has, over the past decades, made it increasingly unaware of what is actually going on in the marketplace. Its Order seems to be unaware even of the high-profile arrangements made by high-profile carriers like AT&T